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International Company and Commercial Law Review 2014

Publication Review

Directors' Duties

Professor Andrew Keay

Reviewed by Remus Valsan

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Directors' Duties is a comprehensive, in-depth analysis of the general duties of company directors found in Chapter 2 of Part 10 of Companies Act 2006 (CA 2006). The second edition maintains the number and sequence of chapters of the first edition, but many sections are expanded to incorporate a more in-depth doctrinal analysis and the relevant new case law. Overall, the new edition builds on the strengths of the previous text in several ways. First, the book maintains a careful balance between, on the one hand, technical details concerning the content of directors' duties and the consequences of their breach and, on the other hand, cross-cutting theoretical debates on the purpose of the business corporation and the role of the board of directors in corporate governance. This successful mix of doctrinal and practical insights makes the book equally appealing to academic and practicing lawyers. Second, the book maintains a comparative dimension and includes updates on relevant developments in other common law jurisdictions, notably Australia, Canada and New Zealand. Delaware law, however, does not feature as prominently as one would expect, with the notable exception of the section on the business judgment rule in Chapter 8. A more extensive comparative approach to Delaware and relevant federal US law would have been particularly interesting to academic scholars who call into question the homogeneity of the so-called Anglo-American model of corporate governance.

The book is divided into seventeen chapters. The first three chapters focus on background matters: types of directors recognised at law and the role of directors as fiduciaries, from a theoretical corporate governance perspective. Chapters 4 to 13 analyse the duties comprised in Chapter 2 of Part 10 of CA 2006, with cross-references to other relevant legal provisions and duties. Chapters 14 to 17 are dedicated to procedural and substantive aspects regarding breach and enforcement of these duties.

Certainly, the topic of directors' duties cannot be treated comprehensively in a monograph of this size, and the author clearly underlines this in the introduction. The book does not purport to deal with all duties that directors have under UK law, or even with all duties imposed by CA 2006. The stated focus of this book is on the main duties set forth in Chapter 2 of the act. The remaining part of this review will focus on two chapters that go to the core of directors' fiduciary duties: Chapter 6 on the duty to promote the success of the company and Chapter 9 on conflicts of interest.

The duty to promote the success of the company for the benefits of its members as a whole, set forth in s 172 of CA 2006, is addressed in Chapter 6. This chapter is a remarkable analysis of one of the most controversial and challenging duties of CA 2006. The introductory part of the chapter, discussing the debates that led to the concept of enlightened

shareholder value, builds logically on the more fundamental corporate governance debate between the shareholder primacy principle and the stakeholder theory presented in Chapter 3. Keay's discussion of the link between the common law duty to act bona fide in the interests of the company and the duty in s 172 is particularly insightful, as it brings to the fore the tension between the aim to achieve an *enlightened* shareholder primacy that captures the cultural change in the way in which companies conduct their business, and the judicial proclamations that this section codifies the pre-existing law on the subject.

Another commendable part of this chapter is the analysis of the meaning of the duty to "have regard to" the interests of various stakeholders and the ensuing uncertainties relating to what constitutes a breach of such a duty and who can enforce it. Keay's conclusion, with which the present author agrees, is that the duty to have regard to stakeholders' interests does not impose on directors a requirement *to balance* the interests of shareholders and stakeholders, that is to ensure that all interests are equally promoted. While the actual weight that each relevant interest should carry in the decision-making process is a matter left to directors' good faith exercise of discretion, an integrated understanding of s 172 as a whole leaves no doubt that the interests of present and future members rank ahead of the other relevant factors to be taken into account. The duty to take into account relevant considerations and to ignore irrelevant ones while exercising discretion is not restricted to company directors. It is a fundamental duty that governs the exercise of discretion by all fiduciaries.¹ From this perspective, Keay's analysis could have been enriched by insights from the trust law debates regarding the meaning of 'relevant consideration', the appropriate weight for relevant considerations, the ways in which this duty is breached or the consequences of breach.

Another complex and controversial aspect of s 172 concerns the enforcement by stakeholders of the duty to have their interests taken into account. Keay argues convincingly that the main avenue for protecting stakeholder interests is via actions initiated by shareholders, such as board dialogue or derivative actions. This view is accurate from a company law perspective, but incomplete from a corporate governance angle. It fails to take into account the disclosure side of the concept of enlightened shareholder value. Indeed, Company Law Review's vision of the enlightened shareholder value principle encapsulated in the codified duty of loyalty is built on two pillars. The first one is the duty to take into account stakeholders' interests while promoting the success of the company (enshrined in s 172). The second one consists of meaningful disclosure duties concerning employees, suppliers, environmental, social and community matters (set forth in the now repealed s 417 on the business review). The philosophy behind the two facets of the codified duty of loyalty was that the new duty will acquire its force not through threat of litigation, but through an increased disclosure obligation and the ensuing market scrutiny.² The legislators' commitment to meaningful disclosure as a tool for enforcement is evidenced by the newly introduced duty to prepare a strategic report³ which imposes on directors of quoted companies a duty to disclose their policies on, among others, company's employees and environmental, social, community and human rights matters. While such disclosure obligations are aimed primarily at company's members, they are also widely studied by would-be investors and other stakeholders.

The legal provisions regulating conflicts of interest form another key aspect of directors' fiduciary duties. Keay's extensive analysis of these provisions spreads across four chapters:

¹ See Geraint Thomas, *Thomas on Powers*, 2nd ed. (Oxford: Oxford University Press, 2012) 555-558.

² John Lowry, "The Duty of Loyalty of Company Directors: Bridging the Accountability Gap through Efficient Disclosure" (2009) 68(3) Cambridge Law Journal 607 at 618.

³ Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013/1970.

Chapters 9 to 12. Similar to the other chapters in this book, the discussion of the legal provisions as interpreted and applied by courts is very meticulous. From a doctrinal point of view, however, these chapters are a missed opportunity to engage critically with the justifications that courts and commentators have provided for the peculiar strictness of the rule against conflicts of interest. The author lists briefly the two main justifications of the no-conflict rule, namely deterrence and evidentiary difficulties, but a critical evaluation of the soundness of these arguments is absent. Arguably, engaging with these debates is beyond the scope of this work. Nevertheless, identifying a solid theoretical foundation for the strictness of this rule is vital for its survival, especially in the light of recent judicial pronouncements arguing for its relaxation.⁴

Finally, a point on the consequences of breach of the duty not to accept benefits from third parties established by s 176 CA 2006. The nature of the remedy for breaching this duty by accepting secret commissions or bribes has been a highly controversial fiduciary law issue for the past century. The author summarises the personal versus proprietary remedies controversy in Section H of Chapter 15 and concludes, in the light of the applicable law at the time, that the personal claim view established *Metropolitan Bank v Heiron*⁵ and *Lister & Co v Stubbs*⁶ is the valid approach. This is no longer accurate. In the very recent decision of *FHR European Ventures LLP and others (Respondents) v Cedar Capital Partners LLC (Appellant)*⁷ the UK Supreme Court ruled unanimously that these two decisions should be regarded as overruled. When an agent or another fiduciary acquires a benefit as a result of his fiduciary position or pursuant to an opportunity resulting from his position, that benefit is held on trust for the principal.

The second edition of *Directors' Duties* consolidates the position of this book as a reference text in this area of company law. It is hoped that the future editions will strengthen this book's contribution to a coherent set of rules, principles and concepts governing the fiduciary duties of company directors.

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⁴ See, for example, *Murad v Al-Saraj* [2005] EWCA Civ 959 at [82], per Arden LJ.

⁵ (1880) 5 Ex D 319.

⁶ (1890) 45 Ch D 1.

⁷ [2014] UKSC 45.